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Supreme Court, U.S.
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No.92-443

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

James M. Elfelt, Joseph P. Elfelt
Anthony J. Elfelt, Lawrence W. Elfelt,
Paul G. Elfelt, David C. Elfelt
and Steven M. Elfelt,

Petitioners

v.

Albina Cooper, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT FOR THE STATE
OF WISCONSIN

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the IRS have the legal authority to transfer ownership of respondent's husband's undivided one-half interest in Wisconsin homestead property by the use of administrative levy procedures in lieu of a judicial foreclosure proceeding?

2. Did the petitioner's parents receive, in a quit claim deed from the IRS, good title to respondent's husband's undivided one-half interest in Wisconsin homestead property without the respondent providing her consent to the sale and without the IRS providing notice to the respondent of the administrative sale of her husband's interest?

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STATEMENT OF THE CASE

This matter is before the Supreme Court on a Petition for Writ of Certiorari to the Wisconsin Supreme Court which, in a decision dated June 17, 1992, remanded this case to the Circuit Court with directions to enter judgment declaring Mrs. Cooper to be the sole owner of the property at issue in this action in fee simple absolute.

In 1963 Albina and Dale Cooper purchased property at 38050 Dolmar Park Road, Dousman, Wisconsin. Six years later, in 1969, a house was completed and the Cooper's moved in as husband and wife. They continued to reside there throughout their marriage until Mr. Cooper passed away in 1989. Albina Cooper, now age 71, has lived in the home for 23 years.

On January 11, 1985, the IRS filed a Notice of Lien against Dale Cooper's interest in the homestead property in the amount of $13,283.22, for unpaid income taxes owed solely by Dale Cooper. It is undisputed that Albina

Cooper was not liable for any taxes unpaid by her husband. On November 15, 1985, the IRS issued a Notice of Levy on the Cooper homestead for the unpaid income taxes owed by Dale Cooper. Thereafter, the IRS did not proceed under 26 U.S.C. §7403, which provides for judicial foreclosure of the property of delinquent tax payers. Instead, the IRS apparently assumed that administrative procedures provided by 26 U.S.C. §6331 authorized it to sell Mr. Cooper's interest in the homestead property without a judicial adjudication, and without notice to Albina or any other party with an interest in the subject property.

On June 25, 1986, the IRS conducted an administrative tax sale of Mr. Cooper's interest in the home. The successful bidders were John and Stacy Elfelt. On January 5, 1987, the IRS issued a quit claim deed for the undivided one-half interest of Dale Cooper to John and Stacy Elfelt. Subsequently, on January 31, 1987, the

senior Elfelts issued a quit claim deed to their seven sons, the petitioners in this action.

In March of 1988 the petitioners filed a Summons and Complaint in Waukesha County Circuit Court requesting the Court declare the petitioners owners of a one-half interest of the property with Mrs. Cooper as tenants in common, and requesting a forced sale partition of the property with one-half of the proceeds to go to the Elfelts plus rent alleged to be due and owing from Dale Cooper retroactive to January, 1987.

Dale Cooper died on April 1, 1989 while the action was still pending in the trial court. Albina Cooper subsequently filed a third-party complaint and counter-claim for quiet title, alleging that the IRS failed to follow certain procedures mandated by the revenue laws, thereby resulting in an invalid seizure and sale, and the issuance of an invalid quit claim deed to the purchasers, John and Stacy Elfelt.

The case was tried to an advisory jury on April 17, 1990. The Court reserved for itself the legal question of whether the IRS had the legal authority to sell Mr. Cooper's interest in the homestead in the manner and form accomplished. The jury was submitted one question:

> Did the Internal Revenue Service comply with the legal requirements in selling to John and Stacy Elfelt all of Dale T. Cooper's interest in the real property located at 38050 Dolmar Park Road, Dousman, Wisconsin?

The jury answered affirmatively and the respondent filed a motion for judgment notwithstanding the verdict, which was denied. The trial court entered judgment for the Elfelts, finding that the IRS had legally conveyed Dale Cooper's interest to the Elfelts, declaring the petitioners and respondent to be tenants in common, ordering a sheriff's sale of the property and requiring Mrs. Cooper to pay back rent to the Elfelts.

The Court of Appeals affirmed the trial court judgment. The Wisconsin Supreme Court granted Mrs. Cooper's Petition for Review and reversed the lower courts. The Wisconsin Supreme Court held that without Mrs. Cooper's consent, and in the absence of court action, §6331 does not give the IRS the authority to sell Mr. Cooper's interest in the homestead. In view of Mrs. Cooper's counter-claim, the Wisconsin Supreme Court considered the matter a quiet title action and held that the quit claim deed from the IRS did not convey any interest in the property to the Elfelts. Because Mrs. Cooper held the property as a joint tenant with right of survivorship together with her now deceased husband, the Wisconsin Supreme Court remanded to the trial court with directions to enter judgment declaring the petitioner to be the sole owner of the property in fee simple absolute.

ARGUMENT

I. THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT BECAUSE THE DECISION OF THE WISCONSIN SUPREME COURT TURNS UPON ITS OWN FACTS, AND A RECENT STATUTORY CHANGE RENDERS THE DECISION'S IMPACT MINIMAL AND UNLIKELY TO AFFECT OTHER LITIGANTS.

This case is not worthy of review by this Court because the Wisconsin Supreme Court decision will probably affect no other litigants. The decision of the Wisconsin Supreme Court is based on a peculiar factual scenario which, because of a change in federal statutory law, is unlikely to ever occur again after July 1, 1989. A recent amendment to the IRS Code exempts a taxpayer's principle residence from levy, with very few exceptions. *See Technical and Miscellaneous Review Act of 1988*, Pub. L. No. 100-647, §6236(c)(4)(A), 102 Stat. 3342, 3739, now

codified at 26 U.S.C. §6332(a)(13). The only exceptions require a written approval at the highest levels of the IRS or a finding that tax collection is in jeopardy. 26 U.S.C. §6332(e)[1]. The amendment thus precludes the unfettered exercise of discretion by low level bureaucrats that occurred in this case by prohibiting such an administrative levy and sale of homestead property after July 1, 1989. Since the IRS has been precluded now for more than two years from taking the sort of action it took in the respondent's case, it is highly unlikely the Wisconsin Supreme Court decision will affect any other litigants. A decision by this Court determining the application of a

---

[1] *See also*, Senate Finance Committee testimony of David C. Keating explaining the modifications of levy and sale procedures, March 19, 1984, CIS 85:S361-3, p. 76 (distraint is most sweeping action affecting taxpayers; should only be done in such circumstances after careful review at district director level and represent an agency decision, rather than low level employee decision.)

statute to facts which are unlikely to recur would be a mere esoteric exercise.

In fact, the petitioners, in their brief in opposition to review by the Wisconsin Supreme Court, conceded that this case had little precedential value:

> The Elfelts agree that the question presented is a novel one, as far as state courts are concerned. However, it will have little, if any, state-wide impact, nor is it likely to recur unless resolved by the Supreme Court.

(Response to Petition for Review by the Wisconsin Supreme Court, page 2.) While the Wisconsin Supreme Court nevertheless chose to review the Court of Appeals decision in this case, this Court, of necessity, must limit its review to a very few important cases with substantial national impact.

II. THE WISCONSIN SUPREME COURT DID NOT EXCEED ITS AUTHORITY IN HOLDING THAT THE IRS HAD NO AUTHORITY TO SELL MR. COOPER'S UNDIVIDED ONE-HALF INTEREST IN HOMESTEAD PROPERTY BY ADMINISTRATIVE LEVY.

The petitioner mistakenly believes the Wisconsin Supreme Court decision conflicts with the Supremacy Clause of the United States Constitution. The petitioner apparently believes the Wisconsin Supreme Court decision in this case constitutes state regulation or interference with supreme federal law. The petitioner reads much more into the ruling than the court's decision deserves.

The Wisconsin Supreme Court did not "void an act" of the Internal Revenue Service or otherwise abrogate the Internal Revenue Code. The Wisconsin court did not order the IRS to return the proceeds of the improper administrative sale to Dale's estate. The court merely

exercised it's proper authority as a state court to resolve a property dispute in a quiet title action.

The petitioners purchased under a quit claim deed, and thereby assumed the risk that their claim to title may later prove invalid. The Wisconsin court decision simply determined the validity of that claim to title and thus resolved a controversy between two private parties over title to land within this state. The Wisconsin court explained:

> As stated by the U.S. Court of Appeals for the Seventh Circuit in a case concerning federal tax sales of parcels of land located in Wisconsin:
>
> > Controversies over title to land within a state are particularly appropriate for determination by the courts of that state. We find nothing anywhere to imply that state courts lack power to decide such questions in a quiet title action on the ground that the conveyances were governed by federal law and were an exercise of federal power.

Popp v. Eberlein, 409 F.2d 309, 311 (7th Cir. 1969). *Elfelt v. Cooper*, 168 Wis. 2d 1016-17, (1992); (App. p. 111). The petitioners sought a remedy in state court and cannot now escape scrutiny of the infirmity of their claim to title.

III. THE DECISION OF THE WISCONSIN SUPREME COURT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER FEDERAL COURTS OF APPEAL.

A. The IRS Did Not Have the Legal Authority to Transfer Ownership of the Respondent's Husband's Property to the Petitioners' Parents in the Manner and Form Accomplished.

Notably, the Wisconsin Supreme Court did **not** hold that the IRS could never transfer ownership of a property holder's interest in homestead property. Rather, the Wisconsin court simply held that the procedures relied upon by the IRS in this case did not give the agency the

authority to sell Mr. Cooper's interest in the homestead in the absence of court action or consent by Mrs. Cooper. In so holding, the Wisconsin court first analyzed the methods available to the IRS for the collection of taxes.

In general, there are three different procedures by which the IRS may enforce its tax liens. First, the government may sue the delinquent tax payer for taxes due and thereby obtain a judgment enforceable as any other creditor's judgment. *United States v. Rodgers*, 461 U.S. 677, 682 (1983).

Second, the IRS can choose to proceed directly under 26 U.S.C. §7403 which involves a judicial foreclosure proceeding. However, that statute requires "all persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto." *Id.* Had the IRS chosen this method to collect Mr. Cooper's unpaid tax, Mrs. Cooper would have been a party to the action and she would have had an opportunity

to present to the court equitable reasons for denying a sale of her husband's interest in the homestead property. Again, the Wisconsin Supreme Court explained:

> We recognize that if the IRS had proceeded under I.R.C. §7403 and brought a lien foreclosure action in district court, the IRS might validly have conveyed an interest in the Coopers' jointly held spousal homestead. But even under I.R.C. §7403 the IRS would have to convince the court that such action would be equitable. *See, Rodgers*, 461 U.S. at 709.

Elfelt v. Cooper, 168 Wis. 2d 1008 (1992); (App. p. 123).

A third method for the IRS to enforce a tax lien is set forth in 26 U.S.C. §6331. Under that section, the IRS can choose to initially proceed administratively with a levy procedure to accomplish an interim seizure of the possessory interest in the property pending adjudication of the ownership rights to the property. But the administrative levy procedure is only a provisional remedy. *Rodriguez v. United States*, 629 F.Supp. 333, 334 (Northern District Illinois 1986). A levy action, unlike a §7403

judicial foreclosure proceeding, does not determine any roprietary rights to the property. It merely protects the government's interest so that the rights to property may later be determined in a post-seizure proceeding. *United States v. National Bank of Commerce*, 472 U.S. 713, 731, 86 L.Ed.2d 565, 106 S. Ct. 219 (1985).

This Court in *National Bank of Commerce*, in an effort to clarify the limits of administrative levy procedure stated:

> We now make explicit that §6331 is a provisional remedy, which does not determine the rights of third parties.

Id. at 731. This distinction is especially important when a non-taxpayer third party has an interest in the seized property, as in this case. The IRS cannot defeat the rights of an innocent third party by proceeding with an administrative levy. As this Court explained:

> Congress thus balances the interest of the government in the speedy collection of taxes against the interests of any claimants to the

> property, and reconciled those interests by permitting the IRS to levy on the assets at once, leaving ownership disputes to be resolved in a post-seizure administrative or judicial proceeding.

Id. at 729.

No post-seizure hearings were conducted before the IRS "sold" Dale Cooper's interest to the petitioners' parents. By proceeding under §6331 the IRS did no more than freeze the status quo to protect the government's interest. The use of an administrative levy does no more than "perfect" the government's security interest in the tax lien. *Rodriguez v. United States, supra* at 40. Absent any court adjudication of ownership rights to the property, the IRS simply had no authority to sell any interest of Dale Cooper in the family homestead without first conducting post-seizure hearings to determine the rights of any third-parties, including the respondent, Albina Cooper. *See, United States v. National Bank of Commerce, supra* at 731.

Accordingly, the Wisconsin Supreme Court

correctly held that the IRS improperly sold Mr. Cooper's interest in the family homestead property before the ownership rights to the property were lawfully determined.

B. The Wisconsin Supreme Court's Decision Does Not Conflict With Federal Court Decisions.

The Wisconsin Supreme Court carefully discussed, analyzed, and applied all relevant federal cases and decisions of this Court in determining the validity of the purported title acquired by the petitioners' parents in the administrative tax sale.

The Wisconsin Supreme Court decision does not conflict with this Court's holding in *United States v. Rodgers*, 461 U.S. 677 (1983) which involved a judicial foreclosure proceeding. This Court in *Rodgers* held **only** that a federal district court is empowered to order the sale of a family home in which a delinquent taxpayer shared an interest. But this Court specifically noted that a federal court may refuse a sale in the exercise of equitable

discretion in individual cases by balancing the governments' interest in tax collection against the possibility that innocent third parties will be unduly harmed. *Id.* at 709. In this case, the IRS did not permit a court that exercise of discretion when it purported to administratively sell Mr. Cooper's interest.

The Wisconsin Supreme Court did **not** hold, as the petitioners claim, that state homestead property is exempt from forced sale. Rather, the court simply held that the IRS could not obtain by administrative action greater authority than Mr. Cooper himself possessed and that he could not have sold his interest in the homestead to another without court action or Mrs. Cooper's consent. 168 Wis. 2d at 1023 (App. p. 122-23).

Neither does the Wisconsin Supreme Court decision conflict with this Court's decision in *National Bank*. This Court specifically limited the application of its ruling in that case:

> We stress the narrow nature of our holding. By finding that the right to withdraw funds from a joint bank account is a right to property subject to administrative levy under §6331, we express no opinion concerning the federal characterization of other kinds of state-law created forms of joint ownership. This case concerns the right to levy only upon joint bank accounts.

National Bank of Commerce, 472 U.S. at 726, n.10.

The Wisconsin Court discerned the obvious distinction between Mr. Cooper's interest in the family homestead and that of the owners of the joint bank account in *National Bank*, where the delinquent taxpayer had easy and immediate access to the entire amount on deposit without the consent of his co-depositors. 168 Wis. 2d at 1022 (App. p. 121-22).

Following this Court's direction in *National Bank*, the Wisconsin court first looked to state law to determine the nature and existence of Mr. Cooper's property right in the homestead. Once that was determined, the court correctly noted that state law consequences are inoperative

and that tax consequences thenceforth are dictated by federal law. The court followed the well-established principle that the IRS steps into the taxpayer's shoes and acquires only those rights the taxpayer himself possessed. 168 Wis. 2d at 1020 (App. p. 116), citing *National Bank*, 472 U.S. at 725.

Under Wisconsin state law, the nature of homestead property held in joint tenancy by husband and wife is such that it is inalienable without the consent of both spouses. §706.02(1)(f), Wis. Stats. One spouse may not convey any interest in the property without either the consent of the other spouse or a court judgment permitting a division of their interests. The Wisconsin Supreme Court thus concluded:

> As Mr. Cooper would not be able to convey any interest of the jointly held spousal homestead without Mrs. Cooper's consent, the IRS, which merely steps into Mr. Cooper's shoes, also cannot convey any interest of the jointly held spousal homestead without either Mrs. Cooper's

> consent **or court action**. Due to the nature of Mr. Cooper's property interest under Wisconsin law, any conveyance of that interest by the IRS without Mrs. Cooper's consent and without court action is ineffective. Consequently, the Elfelts did not obtain and do not now own an interest in Mrs. Cooper's homestead. (emphasis added)

168 Wis. 2d at 1023 (App. p. 122-23). Thus, the Wisconsin Supreme Court followed the reasoning of this Court in determining the nature of Mr. Cooper's interest and the affect of federal law upon that interest by holding the IRS acquired no more interest in the property than Dale Cooper himself possessed.

Finally, contrary to the Petitioners' assertion, the Wisconsin Supreme Court decision does not conflict with *Herndon v. United States*, 501 F.2d 1219 (8th Cir. 1974). In *Herndon*, the wife of a delinquent taxpayer brought an action, before the tax sale, to enjoin the IRS from selling the homestead property which was titled **solely** in her husband's name. The only issue in that case was:

> whether the plaintiff can assert whatever homestead rights she has under Arkansas law and the facts of this case to preclude the United States from selling the real property owned solely by her husband.

501 F.2d at 1220.

The plaintiff did not own the homestead property as a joint tenant in her own name or in tenancy by the entirety.[2] Instead, under Arkansas homestead law, she apparently held a contingent property interest. She did not own any interest in the property which could be diminished in value by an IRS sale.

Moreover, the Eighth Circuit pointed out that at best the IRS could sell only the husband's real estate subject to the wife's rights under the Arkansas homestead statute, and noted that a buyer at a tax sale may acquire

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[2]The government conceded that had the plaintiff and her husband held the real property as tenants by the entirety under Arkansas law, the IRS would have been precluded from attaching the property in the first instance. 501 F.2d at 1220-21.

a clouded title which may be insufficient to defeat the interests of the delinquent taxpayer's wife. *Id.* at 1223. The Eight Circuit court, however, did not have to decide the issue facing the Wisconsin Supreme Court in this case: the status of a claim to title acquired by a buyer at an administrative tax sale.

By purchasing homestead property at an administrative sale, the Elfelts accepted a large risk. In return they mistakenly hoped to obtain a half-interest in valuable Wisconsin lake country property at an enormous discount. To the Elfelts the lesson of this case is simple: *caveat emptor.*

IV. THE PETITIONERS' INTERPRETATION OF THE INTERNAL REVENUE CODE IN THIS CASE WOULD BE UNCONSTITUTIONAL AND IS THEREFORE PER SE UNREASONABLE.

Although the Wisconsin Supreme Court did not reach the respondent's constitutional arguments, the

petitioners have nevertheless raised the issue in their brief. The petitioners continue to mischaracterize the respondent's constitutional argument as an attack on the facial constitutionality of the administrative levy procedure.

The respondent does not argue that the levy and distraint procedures of §6331 are inherently unconstitutional. Rather, the respondent submits that §6331 is simply inapplicable to her case. A contrary interpretation of that statute would be per se unreasonable, as Mrs. Cooper's constitutional due process right to proper notice would be violated. §6331 requires no notice to innocent third parties with an interest in the seized property. That congress made no provision for notice to an innocent non-liable spouse that her right to the lifetime enjoyment of her homestead property could be jeopardized by administrative seizure and sale of the interest of a delinquent spouse indicates that such a

method was never intended to be employed in Mrs. Cooper's situation.

Unlike the innocent co-depositor of the joint account levied upon in *National Bank*, Mrs. Cooper's property was adversely affected by the administrative sale. Her right of survivorship was extinguished by the administrative sale. This diminution in the value of her interest without any requirement of due process notice by the IRS would be unconstitutional, *see*, *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795-800 (1983).

Thus, while the administrative levy procedures are not intrinsically unconstitutional, they would certainly be unconstitutional in their application to Mrs. Cooper's case if they are interpreted as being suitable here.

V. THE RESPONDENT'S HOMESTEAD PROPERTY WAS INDIVISIBLE AND THEREFORE TITLE COULD ONLY BE CONVEYED BY THE IRS IF

IT SOLD THE WHOLE PROPERTY PURSUANT TO 26 U.S.C. §6335(C).

The Wisconsin Supreme Court did not reach the respondent's argument that under §6335(c) the Cooper homestead property was indivisible and therefore the IRS should have sold the entire homestead, not just Mr. Cooper's interest. Nevertheless, the respondent again asserts here that the administrative sale of only Mr. Cooper's interest in the property to the Elfelts was invalid as contrary to the Internal Revenue Code.

Whatever interest the IRS acquires, whether by judicial foreclosure or provisional possessory interest by administrative levy, can be no greater than that of the taxpayer himself. *In re Carlson*, 580 F.2d 1365, 1369 (10th Cir. 1978). As discussed earlier, under Wisconsin law, homestead property held by husband and wife in joint tenancy has unique characteristics which make it indivisible unless with the consent of both spouses. *See*

§706.02(1))f), Wis. Stats. Therefore, at best the IRS could obtain only Dale Cooper's indivisible interest in the homestead which could not be sold without Mrs. Cooper's consent. There is no question that Mr. Cooper could not have unilaterally sold his undivided one-half interest to Mr. Elfelt and left Albina Cooper with an uninvited bedfellow to intrude upon the joint tenancy she formally enjoyed with her husband. Likewise, the purported conveyance to the Elfelts by the IRS was as void as if Dale himself had tried to sell to them without Albina's signature.

Therefore, because a husband/wife joint tenancy in homestead property is indivisible, the entire Cooper property should have been sold pursuant to §6335(c), rather than just Dale Cooper's indivisible one-half interest. Section 6335(c) of the Code, concerning the sale of indivisible property provides:

> c). Sale of indivisible property. If any property liable to levy is not divisible, so as to enable the secretary by sale of part thereof to raise the whole amount of the tax and expenses, the whole of such property **shall** be sold. (emphasis added).

Since the IRS did not offer for sale the entire Cooper property, the purported sale of Dale Cooper's one-half interest to the Elfelts is void. *State Bank of Drummond*, 93 Wis. 2d 148, 157, 286 N.W.2d 547 (1980).

CONCLUSION

For all of the foregoing reasons respondent respectfully requests this Court deny this Petition for Writ of Certiorari. The Wisconsin Supreme Court correctly held that the petitioners may not enhance their interests in the property beyond the terms under which they allegedly acquired them in a quit claim deed and, to their unfortunate dismay, that deed has proven to be invalid. It is finally time to put to an end this protracted litigation

over property on which a 71 year old widow expects and deserves to live out her remaining years.

Respectfully submitted,

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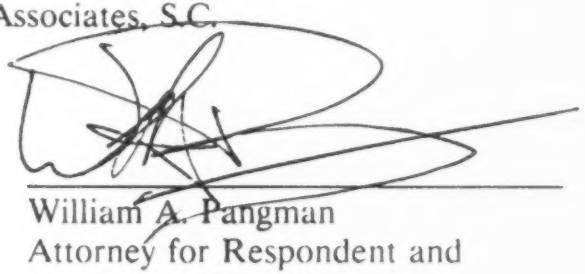

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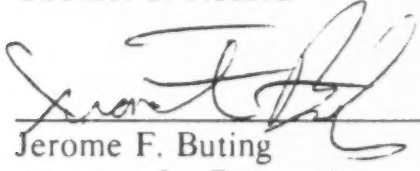

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Pages 29 thru 100

No. 90-1326

STATE OF WISCONSIN : IN SUPREME COURT

James M. Elfelt, Joseph P. Elfelt, Anthony J. Elfelt, Lawrence W. Elfelt, Paul G. Elfelt, David C. Elfelt, and Steven M. Elfelt,

Plaintiffs-Respondents-Cross Appellants,

v.

Albina Cooper,

Defendant-Appellant-Cross Respondent-Petitioner,

Dale Cooper,

Defendant.

REVIEW of a decision of the Court of Appeals. *Reversed and remanded.*

LOUIS J. CECI, J. This case is before the court on a petition for review of a published decision of the court of appeals, *Elfelt v. Cooper*, 163 Wis. 2d 484, 471 N.W.2d 303 (Ct. App. 1991). The court of appeals affirmed the judgment of the circuit court for Waukesha

County, Clair Voss, Circuit Judge, which declared, after a jury trial, that the plaintiffs (the Elfelts) were owners of an undivided one-half interest in the home of the defendant Albina Cooper (Mrs. Cooper) as tenants in common. The judgment ordered a sheriff's sale of the property and determined an amount of rent due from Mrs. Cooper to the Elfelts.

The issue presented for review is whether §6331 of the Internal Revenue Code, 26 U.S.C. §6331 (I.R.C. §6331),[1] gives the Internal Revenue Service (IRS) the

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1 I.R.C. §6331 provides in relevant part:

§6331. Levy and distraint

(a) Authority of Secretary

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such

authority to sell Dale Cooper's (Mr. Cooper) undivided one-half interest in Mr. and Mrs. Cooper's homestead held in joint tenancy. We hold that without Mrs. Cooper's consent, and in the absence of court action, I.R.C. §6331 does not give the IRS the authority to sell Mr. Cooper's interest in the homestead, and we therefore reverse the court of appeals and remand to the circuit court with directions to enter judgment declaring Mrs. Cooper to be the sole owner of the property in fee simple absolute.

The facts are as follows. In 1963, the Coopers purchased the property at 38050 Dolmar Park Road,

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tax. . . .

(b) Seizure and sale of property

The term "levy" as used in this title includes the power of distraint and seizure by any means. . . . In an case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

Dousman, Wisconsin, as husband and wife.[2] In 1969, construction of a home on the property was completed, and the Coopers moved in. As of the time the briefs in this case were filed, Mrs. Cooper was age 70 and had lived in the homestead for over 21 years.

On January 11, 1985, the IRS filed a lien notice against the real estate of Mr. Cooper in Waukesha County. The lien was in the amount of $13,283.22 and was for unpaid income taxes for the year 1982. It is undisputed that Mrs. Cooper was not liable for any taxes unpaid by Mr. Cooper. On November 15, 1985, after Mr. Cooper did not pay the amount in dispute, the IRS mailed notice to Mr. Cooper that the IRS had seized Mr.

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[2] The property is more particularly described as:

Lot 18 in Dolmar Park, a subdivision of part of the NE 1/4 of the SE 1/4 of Section 17, and the NW 1/4 and the SW 1/4 of the SW 1/4 of Section 16, in Township number 6N, Range 17 East, in the town of Ottawa, Waukesha County, Wisconsin.

Cooper's interest in the homestead on Dolmar Park Road. The Coopers continued to live in the home after the seizure.

On June 25, 1986, the IRS conducted a tax sale of Mr. Cooper's interest in the home. The successful bidders were John and Stacey Elfelt. On January 1, 1987, John Elfelt made a written demand upon Mrs. Cooper for a proportionate share of the reasonable rental value of the property. On January 5, 1987, the IRS district director issued a quitclaim deed for the interest of Mr. Cooper to John and Stacey Elfelt. John and Stacey Elfelt issued a quitclaim deed to their seven sons, the plaintiffs in this matter.

On March 28, 1988, the Elfelts filed a summons and complaint, which was later amended, requesting that the court declare the Elfelts owners of an undivided one-half interest in the property with Mrs. Cooper as tenants in common, requesting a partition of the property by its

sale with one-half of the proceeds to go to the Elfelts, plus rent in the amount of one-half the reasonable rental value of the property subsequent to January 1, 1987. The Coopers both filed *pro se* motions to dismiss. After a hearing on March 13, 1989, the circuit court denied the Coopers' motions to dismiss. On April 1, 1989, Mr. Cooper died.

Mrs. Cooper filed a *pro se* answer and a motion to dismiss on April 25, 1989. The Elfelts responded with a motion for summary judgment. Mrs. Cooper retained counsel, and, after a hearing, the circuit court denied both parties' motions.

On September 6, 1989, Mrs. Cooper filed a third-party summons and complaint, an amended answer, affirmative defenses, and a counterclaim for quiet title. The third-party complaint was dismissed by stipulation of the parties. The amended answer and affirmative defenses alleged that the IRS failed to follow certain procedures

mandated by the I.R.C., that the seizure and sale was invalid, and that the quitclaim deed to John and Stacey Elfelt was therefore invalid.

The case was finally tried in April, 1990, to an advisory jury. The court reserved for itself the legal question of whether the IRS had the legal authority to sell Mr. Cooper's interest in the homestead in the manner and form accomplished. The jury was asked to answer one verdict question:

> Did the Internal Revenue Service comply with the legal requirements in selling to John and Stacey Elfelt all of Dale T. Cooper's interest in the real property located at 38050 Dolmar Park Road, Dousman, Wisconsin?

The jury's answer was "They (the Internal Revenue Service) did comply." Mrs. Cooper filed a motion for judgment notwithstanding the verdict, which was denied.

The court entered judgment for the Elfelts, finding that the IRS had legally sold Mr. Cooper's interest in the homestead to the Elfelts; declaring the Elfelts and Mrs. Cooper to be tenants in common, each owning in fee simple an undivided one-half interest in the property; ordering a sheriff's sale to partition the property; and ordering Mrs. Cooper to pay rent to the Elfelts.

The court of appeals affirmed the circuit court judgment and remanded for further findings. *Elfelt*, 163 Wis. 2d at 501-502. We granted Mrs. Cooper's petition for review.

The issue presented by this case, whether I.R.C. §6331 gives the IRS the authority to sell Mr. Cooper's undivided one-half interest in Mr. and Mrs. Cooper's homestead, involves the application of a statute to an undisputed set of facts. Statutory interpretation is a question of law which we review without deference to the lower courts. *Pulsfus Farms v. Town of Leeds*, 149 Wis. 2d

797, 803-04, 440 N.W.2d 329 (1989). The jury's verdict in this case, which was advisory only, found that the IRS had complied with the legal requirements in selling Mr. Cooper's interest to John and Stacey Elfelt. We do not review that verdict.

Mrs. Cooper argues that the IRS did not have the authority to transfer ownership of Mr. Cooper's ownership interest in the Coopers' homestead to the Elfelts in the manner and form accomplished: that because the property was a jointly held homestead, it may only be sold with Mrs. Cooper's consent or by a court order in the absence of Mrs. Cooper's consent. Mrs. Cooper also argues that homestead property is indivisible and that therefore, under I.R.C. §6335, it was improper to sell Mr. Cooper's interest without selling the property in its entirety. Finally, Mrs. Cooper argues that I.R.C. §6331 is unconstitutional as applied because it does not require that the IRS give

notice to all parties having an interest in property before the property is sold.

The Elfelts respond that the IRS did have the authority, under I.R.C. §§6331, 6335, 6338 and 6339, to sell Mr. Cooper's undivided one-half interest in the homestead without Mrs. Cooper's consent. In addition, the Elfelts argue that Mrs. Cooper was given remedies by I.R.C. §§6337, 6343, and 7426 that she failed to use, that the constitutionality of I.R.C. §6331 has long been settled, and that state court is not the proper forum for Mrs. Cooper's arguments.

We first note that the state court was a proper forum for this action and for Mrs. Cooper's defense to the action. The Elfelts, not Mrs. Cooper, commenced this action in the state court, seeking to enforce whatever interest they obtained from the IRS, seeking rent from Mr. and Mrs. Cooper, and seeking to have the home sold. The Elfelts should not now complain about Mrs. Cooper

presenting her defenses to the action in a forum that the Elfelts chose. In addition, due to Mrs. Cooper's counterclaim, we view this as a quiet title action. As stated by the U.S. Court of Appeals for the 7th Circuit in a case concerning federal tax sales of parcels of land located in Wisconsin:

> Controversies over title to land within a state are particularly appropriate for determination by the courts of that state. We find nothing anywhere to imply that state courts lack power to decide such questions in a quiet title action on the ground that the conveyances were governed by federal law and were an exercise of federal power.

Popp v. Eberlein, 409 F.2d 309, 311 (7th Cir. 1969). This controversy is properly in the state court system.

The I.R.C. provides the IRS at least three methods of enforcing collection of unpaid taxes. First, the government may sue for the unpaid amount and, if it

obtains a judgment, may exercise the usual rights of a judgment creditor. *United States v. Rodgers*, 461 U.S. 677, 682 (1983) (citing I.R.C. §§6502(a), 7401, and 7402(a)).

A second method is a lien foreclosure suit, authorized by I.R.C. §7403. The suit is a civil action brought in federal district court "to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability." I.R.C. §7403(a). Pursuant to I.R.C. §7403(b), "[a]ll persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto." The suit is a plenary action which requires the court to "adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property." I.R.C. §7403(c).

A third method that the IRS has for enforcing collection of unpaid taxes is the administrative levy, authorized by I.R.C. §6331. Under I.R.C. §6331, the IRS may levy upon and sell the property of a delinquent taxpayer in order to satisfy the tax liability of that tax payer. As opposed to the plenary nature of a lien foreclosure suit, the levy and distraint authorized by I.R.C. §6331 is only a provisional method that typically does not require judicial intervention. *United States v. National Bank of Commerce*, 472 U.S. 713, 720 (1985). In addition, "§6331, unlike §7403, does not 'implicate the rights of third parties,' because an administrative levy, unlike a judicial lien-foreclosure action, does not determine the ownership rights to the property." *Id.* at 731. If parties other than the delinquent taxpayer claim rights in the levied property, they may assert those rights in a postseizure administrative or judicial proceeding under I.R.C. §6343 or §7426. *Id.* at 728-29. Parties proceeding

under I.R.C. §§6343 and 7426 have nine months from the time of the levy to assert their property rights in the levied property. *Id.* at 736 (Powell, J., dissenting). In addition, property that is sold after it is levied upon may be redeemed by the property owners or any person having an interest therein at any time within 180 days after the sale of the property. I.R.C. §6337(b).

Mrs. Cooper did not avail herself of the procedures provided in I.R.C. §§6337(b), 6343, or 7426. If she had, this case would probably not be before us today. Instead, Mrs. Cooper argues that the IRS did not have the authority to sell Mr. Cooper's interest in the homestead property without Mrs. Cooper's consent and that the sale is, therefore, invalid. We agree.[3] In applying the I.R.C.,

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[3]Accordingly, we do not reach Mrs. Cooper's argument under I.R.C. §6335(c) that the property was indivisible and that therefore the IRS should have sold the entire homestead, not just Mr. Cooper's interest. As we find that the IRS did not have the authority to sell Mr. Cooper's interest in the property by administrative sale without Mrs.

Cooper's consent, we need not reach the Elfelts' argument that Mrs. Cooper failed to use the remedies provided to her by I.R.C. §§6337, 6343, and 7426.

We also do not reach Mrs. Cooper's constitutional arguments. Although the U.S. Supreme Court has stated that "[t]he constitutionality of the levy procedure, of course, 'has long been settled,'" *National Bank*, 472 U.S. at 721 (citations omitted), we are doubtful of the constitutionality of the actions of the IRS in this case. If we were not to reverse the court of appeals, the IRS's actions would have led to Mrs. Cooper's no longer having a right of survivorship in her spousal homestead, thereby greatly diminishing the value of her property interest. The court of appeals was incorrect when it stated that "[Mrs. Cooper] has the same interest after the sale that she did before the sale." *Elfelt*, 163 Wis. 2d at 496. Before the sale, Mrs. Cooper had an equal undivided jointly held interest in the whole of the homestead with Mr. Cooper, with a right of survivorship. After the sale, she had an interest in one-half of the property as a tenant in common, with no right o fsurvivorship. This diminution in the value of her property interest, without any requirement that she be given adequate notice by the IRS, puts the application of I.R.C. §6331 into serious constitutional doubt. *See Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795-800 (1983) (Prior to an action that will affect an interest in life, liberty, or property protected by the due process clause, a state must provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Mere notice by publication is not sufficient when interested parties can be

state law determines the nature of the legal interest which the taxpayer had in the homestead property. *National Bank*, 472 U.S. at 722. This is because the I.R.C. does not create any property rights, but merely attaches federally defined consequences to rights which are created under state law. *Id.* Once state law has been used to determine the nature and existence of a property interest, further state law is inoperative, and the tax consequences thenceforth are dictated by federal law. *Id.* (citing *United States v. Bess*, 357 U.S. 51, 56-57 (1958)). In a levy proceeding, the IRS "'steps into the taxpayer's shoes' . . . [and] acquires whatever rights the taxpayer himself possesses." *Id.* at 725 (citations omitted).

In *National Bank*, the delinquent taxpayer was a codepositor in two jointly held bank accounts. *Id.* at 716. Relevant state law provisions, as well as the taxpayer's

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notified by more effective means such as personal service or mailed notice.).

contract with the bank, gave the taxpayer the unqualified right to withdraw the full amounts on deposit in the joint accounts without notice to his codepositors. *Id.* at 723 The Court stated:

> '[I]t is inconceivable that Congress . . . intended to prohibit the Government from levying on that which is plainly accessible to the delinquent taxpayer-depositor.' . . . The taxpayer's right to withdraw is analogous in this sense to the IRS's right to levy on the property and secure the funds. Both actions are similarly provisional and subject to a later claim by a codepositor that the money in fact belongs to him or her.

Id. at 726 (citations and footnote omitted). In a footnote to the above quote, the Court stated:

> We stress the narrow nature of our holding. By finding that the right to withdraw funds from a joint bank account is a right to property subject to

> administrative levy under §6331, we express no opinion concerning the federal characterization of other kinds of state-law created forms of joint ownership. This case concerns the right to levy only upon joint bank accounts.

Id. at 726 n.10

Following *National Bank*, we must first look to state law to determine the nature and existence of Mr. Cooper's property right in the homestead. Once that is determined, further state law consequences are inoperative, and we must turn to federal law. We bear in mind that the IRS cannot gain an interest superior to that which Mr. Cooper himself held.

Under Wisconsin law, the nature of homestead property held in joint tenancy between husband and wife is such that it is indivisible by one spouse without the

consent of the other. Sec. 706.02(1)(f), Stats.[4] The policy objectives of the homestead statute have been long recognized as laudable, providing to each spouse absolutely inalienable rights:

> The policy of the statute indicated is not to give the wife a mere personal right for her personal benefit which she may waive, or be estopped by her conduct from insisting upon, but to protect the home for the benefit of the family and every member of it,- a beneficent policy of the highest character, calling for a broad, liberal application of the statute so as to carry it out, fully, in letter and spirit. If it should be held that the homestead

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[4]Sec. 706.02(1)(f), Stats., provides in relevant part: **706.02 Formal requisites.** (1) Transactions under s. 706.01(1) shall not be valid unless evidenced by a conveyance which:

. . .

(f) Is signed, or joined in by separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead under s. 706.01(7) . . . .

> right is a mere privilege which the wife may waive, or which may be lost under the rules of equitable estoppel, a very efficient way would be open to evade and nullify the statute. Such right is placed high above the reach of any dangers by the absolute disability to alienate the homestead in any manner, except by a joint conveyance of some kind, signed by the husband and wife. The disability of the husband to otherwise covey the homestead is as complete as if it were not alienable at all, and of the wife to otherwise consent to such alienation, as if she were a minor.

Cumps v. Kiyo, 104 Wis. 656, 662, 80 N.W. 937 (1899). While the above-quoted language is dated, it illustrates the nature of the property right that a spouse owns in a homestead in Wisconsin: it is absolutely inalienable without the consent of both spouses and is therefore worthless to one spouse acting alone without the consent of the other.

There is no way to convey any interest in a jointly held spousal homestead in Wisconsin without both spouses' consent except through court proceedings, such as a divorce, bankruptcy, or lien foreclosure. This requirement of spousal consent for the extrajudicial conveyance of any interest in jointly held homestead property is not a mere consequence of a property interest that becomes inoperative under federal law, as the court of appeals incorrectly determined. *Elfelt*, 163 Wis. 2d at 493, 497. Rather, the statutory requirement of spousal consent illustrates that the nature of the property interest owned by a spouse in a jointly held homestead is a limited interest that can only be alienated with the consent of both spouses or by court action.

Mr. Cooper's interest in the Coopers' spousal homestead is distinguishable from the joint bank account in *National Bank*, where the delinquent taxpayer had access to the entire amount without prior consent of his

codepositors. A homestead held jointly by a husband and wife is of an entirely different nature than a joint tenancy between persons who are not married: no interest of a homestead held jointly by a husband and wife can be conveyed without the consent of both spouses, sec. 706.02(1)(f), Stats.; while joint tenants who are not married have the right to sell their individual interests and thereby sever the joint tenancy. *Nelson v. Albrechtson*, 93 Wis. 2d 552, 563, 287 N.W.2d 811 (1980) (citing *Nichols v. Nichols* 43 Wis. 2d 346, 349, 168 N.W.2d 876 (1969)).

As Mr. Cooper would not be able to convey any interest of the jointly held spousal homestead without Mrs. Cooper's consent, the IRS, which merely steps into Mr. Cooper's shoes, also cannot convey any interest of the jointly held spousal homestead without either Mrs. Cooper's consent or court action. Due to the nature of Mr. Cooper's property interest under Wisconsin law, any conveyance of that interest by the IRS without Mrs.

Cooper's consent and without court action is in ineffective. Consequently, the Elfelts did not obtain and do not now own an interest in Mrs. Cooper's homestead.

We recognize that if the IRS had proceeded under I.R.C. §7403 and brought a lien foreclosure action in district court, the IRS might validly have conveyed an interest in the Coopers' jointly held spousal homestead. But even under I.R.C. §7403 the IRS would have to convince the court that such action would be equitable. *See Rodgers,* 461 U.S. at 709 (courts should exercise limited equitable discretion in I.R.C. §7403 proceedings; I.R.C. §7403 empowers a district court to order the sale of a family house in which a delinquent taxpayer has an interest, even though a nondelinquent spouse also has a homestead interest in the house under state law).

As Mr. Cooper is deceased and because we hold that the IRS did not validly convey any interest in the homestead to the Elfelts, Mrs. Cooper now owns the

property in fee simple absolute under her right of survivorship. We therefore remand this matter to the circuit court and direct that the court enter judgment declaring Mrs. Cooper to be the sole owner of the property in fee simple absolute.

By the Court. - The decision of the court of appeals is reversed, and the matter is remanded to the circuit court with directions to enter judgment declaring Mrs. Cooper to be the sole owner of the property in fee simple absolute.